

REMARKS

This is in full and timely response to the above-identified Office Action. The above listing of the claims supersedes any previous listing. Favorable reexamination and reconsideration are respectfully requested in view of the preceding amendments and the following remarks.

Rejections under 35 USC § 103

The rejections of:

- 1) claims 1-3, 6, 13 and 16 under 35 U.S.C. 103(a) as being unpatentable over Prosenz (U.S. Patent 4,376,594) in view of Thompson (U.S. Patent 4,681,302);
- 2) claims 1-3, 5, 6, 13 and 16 under 35 U.S.C. 103(a) as being unpatentable over Prosenz and Thompson and Kuhn (US Patent 3,711,662);
- 3) claim 6 under 35 U.S.C. 103(a) as being unpatentable over Prosenz and Thompson or Prosenz/Thompson/Kuhn as applied above, and further in view of Smith (U.S. Patent 5,022,781); and
- 4) claim 12 under 35 U.S.C. 103(a) as being unpatentable over Prosenz and Thompson or Prosenz/Thompson/Kuhn as applied above, and further in view of Tagg (U.S. Patent 6,837,647),

are summarily traversed.

The Examiner continues to reject the claims of this application, while disregarding the teachings which can be gleaned from the cited references and arguments submitted. Essentially, the dispute revolves around the question as to whether or not the combination of Prosenz (U.S. Patent 4,376,954) and Thompson (U.S. Patent 4,681,302) teaches the invention as previously claimed, and especially as now claimed in the amended set of claims.

As can clearly be seen in Fig. 6 of Prosenz, which is a top plan view of the disclosed barrier with two juxtaposed elements in a dislocated state, the Examiner has overlooked at least some of the teachings of the structure described in this reference and has disregarded the very important and basic feature of the Prosenz arrangement, wherein the lateral surfaces of Prosenz are designed to touch each other (see arrow 9 in Fig. 3 and the description in lines 1 to 28 of col. 26 thereof). Specifically, as seen and described, the lateral surfaces are configured to have proper varied curved radii and to contact each other.

In contradistinction thereto, and as now defined in claim 1, and seen in the drawings, the lateral surfaces of the structural elements according to the present invention do not contact each other and form a gap thereinbetween.

Furthermore, as is now also clearly defined in claim 1, and in contrast to the teaching of Prosenz, in each element of the claimed invention, there is formed a hole or a bore accommodating the rod with a clearance, facilitating the introduction of "energy-absorbing material" thereinbetween.

Thus, due to the above-specified distinguishing facts, Prosenz cannot serve as a primary reference against the present invention, as claimed in amended claim 1, and explained above.

With respect to the cited Thompson Patent, it is our understanding that, in fact, Thompson teaches away from the present invention since the "pin bushing 40" cannot be considered analogous to the "energy-absorbing material", as argued by the Examiner, since a "bushing" is not in its common definition and understanding "an energy-absorbing material", but rather the acceptable universal understanding is that a bushing is "a removable cylindrical lining for an opening (as of a mechanical part) used to limit the size of the opening, resist abrasion, reduce friction or serve as a guide."

In this office action under the heading of "Response to Arguments" it is asserted that "[A]ll material inherently has some energy absorbing qualities." However, the rejection is made under § 103 and not §102. Therefore, common sense is a requirement (see *KSR Mil Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1739 (2007)). Under § 102 absurd notions can be advanced, however in this case, it is the understanding of the hypothetical person of ordinary skill that is the standard which must be met.

Under § 102 it may be feasible to advance that stainless steel or tungsten carbide may have some energy absorbing qualities (probably immeasurably small). However, under § 103 this position cannot be tenably advanced. Besides, for something to be "inherent" it must occur in each and every instance and there appear to be any number of materials which will not rationaly be considered "inherently" capable of absorbing energy.

Therefore, the Examiner's attempt to attribute the features of a "bushing" to the feature of "energy-absorbing material" is clearly based on hindsight and the teaching of the present invention, and not on common interpretation of each of these entirely different concepts. The citation to Kuhn does nothing to advance this understanding. Indeed, as indicated in the

rejection, this reference merely teaches that polytetrafluoroethylene can be used to lower friction and to facilitate rotation. The energy absorbing feature is neither disclosed nor suggested by this reference. Therefore the above § 102 approach, which is relied upon to extrapolate to untenable limits, is improper and cannot be applied in order to formulate a claim rejection.

Further, the only notion that polytetrafluoroethylene could be used as an energy absorbing material is engendered by the claims and disclosure of the instant application. It is respectfully submitted that the applicants' claims and disclosure are not available as references against themselves. Of course polytetrafluoroethylene is well known especially in connection with coatings applied to cook ware. However, its use as an energy absorbent is not, and the Kuhn reference does nothing to dispel this position.

The citation of the Kuhn reference appears to be the sole reason for making the instant rejection final. However, this reference fails to demonstrate any energy absorbing characteristics.

In addition, there is no hint in Thompson that the "bushing 40" can be located at any part of the structural element, specifically traversing an horizontal surface thereof, as does the rod inserted in a hole or a bore, according to the present invention, as defined in claim 1.

It is therefore obvious that the teachings of Prosenz and Thompson cannot be combined at all, and at best, the combination thereof would not result in the structure and features as defined in amended claim 1.

The teachings of Tagg and Smith do nothing to alleviate the above shortcomings and lead to a *prima facie* case of obviousness. Indeed, the teaching of Thompson have not been fully considered. That is to say, whether materials *per se* which could be used to absorb shock are known in the art or not, the actual shock absorbing features of Thompson are ignored. More specifically, the barrier members in this arrangement are filled with water or comprise concrete members with water/fluid filled jackets provided thereon. In addition, some embodiments are provided with a ribbed exterior which is also a feature which facilitates the absorption of impact forces.

It is respectfully submitted that these teachings would lead away from the use of shock absorbing materials in connection with the hinge structures which are used to interconnect segments of the median or roadside barrier disclosed in Prosenz.

New Claim

In this response a new claim 24 is presented for examination. This claim finds support in the specification as originally filed and is patentable in that it sets for subject matter which is neither disclosed nor suggested by the art applied in this Office Action.

Conclusion

It is respectfully submitted that the claims as they have been amended are allowable over the art which has been applied in this Office Action. Favorable reconsideration and allowance of this application are courteously solicited.

Early issuance of a Notice of Allowance is courteously solicited.

The Examiner is invited to telephone the undersigned, Applicant's attorney of record, to facilitate advancement of the present application.

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 07-1337 and please credit any excess fees to such deposit account.

Respectfully submitted,

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